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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 690

JOHN E. HARRISON, SR.,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Illinois.

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INDEX

	Page
Petition	1
Reports of opinions below	2
Grounds on which jurisdiction is invoked	2
(i) Date of judgment	2
(ii) No rehearing sought; no time extension	2
(iii) Statutory basis for jurisdiction	3
Question presented for review	3
Statute involved	4
Statement of the case	5
Raising of federal question	7
No review of federal court decision sought	7
Argument for issuance of writ	8
Conclusion	12
Appendix A—Recalled opinion	13
Appendix B—Final modified opinion	18
Appendix C—Order denying leave to appeal	23

Cases Cited

Lavender v. Kurn, 325 U. S. 645, 653, 90 L. Ed. 916, 66 S. Ct. 740 ..... 8, 9, 11

Lillie v. Thompson, 332 U. S. 459, 68 S. Ct. 140, 92 L. Ed. 78 10

Rogers v. Missouri Pacific, 352 U. S. 500, 507, 1 L. Ed. 2d 493, 77 S. Ct. 443 ..... 8, 11

Sinkler v. Missouri Pacific, 356 U. S. 326, 330, 2 L. Ed. 2d 799, 78 S. Ct. 758 11
Southern v. Roberts, 206 F. 2d 508 9
Tatham v. Wabash, 412 Ill. 568, 107 N. E. 2d 735, 33 A. L. R. 2d 1287, 1294 10
Tiller v. Atlantic Coast Line, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 143 A. L. R. 967 11

Statutes Cited.

Tit. 28, U. S. C., § 1257 (3) 3
Tit. 45, U. S. C., § 1 4

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JOHN E. HARRISON, SR.,
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MISSOURI PACIFIC RAILROAD COMPANY,
a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI.

Petitioner, John E. Harrison, Sr., a natural person, now petitions the Supreme Court of the United States to issue its writ of certiorari to review the final judgment of the Supreme Court of Illinois in the cause entitled "John E. Harrison, Sr., Petitioner, v. Missouri Pacific Railroad Company, Respondent," which final judgment denied petitioner a review by the Supreme Court of Illinois of a decision of the Appellate Court of Illinois, Fourth District, in the cause in the last-named court entitled "John E. Harrison, Sr., Plaintiff-Appellant, v. Missouri Pacific Railroad Company, Defendant-Appellee." The decision

of the Appellate Court affirmed a prior judgment entered by the Circuit Court of St. Clair County, Illinois, in favor of the defendant-appellee Missouri Pacific Railroad Company and against the plaintiff-appellant Harrison notwithstanding the verdict of a jury in favor of the appellant Harrison, fixing damages in the sum of $50,000.00.

(a)

REPORTS OF OPINIONS BELOW.

The judgment of the Supreme Court of Illinois was not accompanied by an opinion.

The Appellate Court of Illinois first filed an opinion March 21, 1962. It is not reported, but is set forth as Appendix A to this petition.

The Appellate Court of Illinois filed its final modified opinion April 19, 1962. It is reported in 35 Ill. App. 2d 66, 181 N. E. 2d 737, and is set forth as Appendix B to this petition.

(b)

GROUNDS ON WHICH JURISDICTION INVOKED.

(i). Date of Judgment

The date of the judgment of the Supreme Court of Illinois sought to be reviewed is September 26, 1962. It was entered on that date.

(ii) No Rehearing Sought; No Time Extension

No rehearing of the judgment was sought or ordered. There has been no extension of time within which to seek certiorari.

(iii) Statutory Basis of Jurisdiction

The statute believed to confer on this Court jurisdiction to review by writ of certiorari is U. S. C. Tit. 28, 1257 (3).

(c)

QUESTION PRESENTED FOR REVIEW.

The suit is one for damages under the Federal Employers' Liability Act, brought by a section foreman against his railroad employer for injuries sustained as the result of an assault and battery upon him by a member of his own crew, also an employee of the railroad, after the foreman had remonstrated with the worker for stealing company property. The theory of liability upon which the suit was tried was that the employer railroad retained the worker in its employ, and assigned him to the plaintiff as a member of the plaintiff's section crew, when the railroad knew the worker was bellicose, pugnacious and contentious and might do violence. The jury returned a verdict in favor of the plaintiff.

The question presented for review is:

In such a case, can the court set aside the verdict of the jury on the ground that there is no evidence to prove the requisite knowledge on the part of the railroad employer when there is testimony in the record (1) that the railroad's roadmaster (in general charge of maintenance-of-way work and the superior of both the plaintiff foreman and the assaulting worker), shortly after assignment of the assaulting worker to the plaintiff's crew but prior to the assault, told the plaintiff, "You will have to watch him [the worker] because he is a bad actor and a trouble maker," and (2) that the same roadmaster, after the assault, told the plaintiff, "I told you to look out for him [the worker]; now you got yourself in plenty of trouble"?

(d)

STATUTE INVOLVED.

The statute involved is U. S. C., Tit. 45, § 1, as follows:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

STATEMENT OF CASE

[Numerical references are to pages in the abstract (appendix) filed herein.]

Plaintiff, a 58-year-old man, was a section foreman employed by the defendant railroad (A. 21). One Anderson, 38 years old, had been assigned by the railroad management as a member of plaintiff's section crew (A. 23, 47, 51). Plaintiff suspected Anderson of pilfering company tools, and at the conclusion of a day's work told Anderson to retrieve a ballast fork from where he believed Anderson had hidden it and restore it to the company tool pile (A. 26). Anderson, incensed, struck plaintiff in the head, knocking him to the ground and rendering him unconscious (A. 27).

Plaintiff sued defendant for damages under the Federal Employers' Liability Act, alleging that the defendant knew of Anderson's vicious propensities and was negligent in assigning him to the crew (A. 3, 4).

At trial, there was evidence that Anderson was assigned to plaintiff's crew by one E. L. Pratt, the defendant's roadmaster, and that Pratt had known Anderson for about four years (A. 23, 47, 51). There was further evidence that a few days after Anderson's assignment to plaintiff's crew Pratt came to see plaintiff about the crew's work and told plaintiff: "You will have to watch him [Anderson] because he is a bad actor and a trouble maker. You will have to watch him. I thought if you couldn't get anything out of him nobody else could" (See A. 23).

There was also evidence that the morning after plaintiff was struck by Anderson, plaintiff was told by Pratt, the roadmaster: "I told you [plaintiff] to look out for him [Anderson]. Now you got yourself in plenty of trouble" (See A. 43). And there was evidence that during the

period of two months which intervened between the assignment of Anderson to plaintiff's crew and the date of Anderson's assault upon plaintiff, plaintiff made frequent complaints to Pratt as to Anderson's disobedience, pranks and vulgar language (A. 24).

There was evidence that, following the assault plaintiff was required to obtain medical assistance, and that he had been unable to work thereafter (A. 27, 28).

The jury found the issues for the plaintiff, and returned a verdict in his favor for $50,000.00 (A. 11). The trial judge, however, entered a judgment for the defendant notwithstanding the verdict, finding that "when all the evidence is considered, together with all reasonable inferences therefrom in its aspect most favorable to plaintiff, there was a lack of evidence to sustain the jury's verdict" (A. 14, 15).

Plaintiff appealed from this judgment to the Appellate Court of Illinois for the Fourth District (A. 84).

The case was briefed and argued in that court, and on March 21, 1962, it filed an opinion (Appendix A, this petition) ruling as follows (concluding paragraph):

> "... We believe that the record in the instant case ... fails to show that Anderson, during the period prior to the assault, was such a dangerous person or of such character as to justify a recovery on the basis that the employer knew of such characteristics or in the exercise of reasonable care should have known of such dangerous characteristics. It is apparent that Anderson may have been involved in stealing and when accused became angered and struck plaintiff to satisfy his own spite. Under the circumstances and the record before us we conclude that the verdict is not sustained by a preponderance of the evidence, that it is clearly contrary to the manifest weight of the evidence and the order of the Circuit Court of

St. Clair County in entering judgment notwithstanding the verdict was proper and is affirmed."

Thereafter, on April 19, 1962, this opinion was withdrawn and another substituted (Appendix B, this petition). It was identical with the first opinion except that there were eliminated from the final paragraph the words . . .

". . . we conclude that the verdict is not sustained by a preponderance of the evidence, that it is clearly contrary to the manifest weight of the evidence . . ."

The judgment of the Appellate Court affirming the judgment notwithstanding the verdict of the jury in the Circuit Court was entered on the same day (A. 93).

The plaintiff thereupon filed his petition with the Supreme Court of Illinois praying leave to appeal from the Appellate Court judgment to the Supreme Court. This was denied without opinion on September 26, 1962 (A. 93).

The petition now at bar follows.

(f)

RAISING OF FEDERAL QUESTION.

The applicability of federal law was inherent from the inception of this case: the complaint was founded on the Federal Employers' Liability Act (A. 3). The opinion of the Appellate Court of Illinois (Appendix B) shows the filing under that act, and the determination of the cause under that act.

(g)

NO REVIEW OF FEDERAL COURT DECISION SOUGHT.

No review of any federal court judgment is sought by this petition.

(h)

ARGUMENT FOR ISSUANCE OF WRIT.

It is clear that the judgments below were reached as the result of judicial determinations that the evidence adduced at trial was insufficient in weight to warrant the jury's finding that the defendant was chargeable with knowledge of Anderson's bellicose proclivities to an extent which made it negligence to assign him to work.

Such determinations are not permissible in actions tried under the Federal Employers' Liability Act.

> "Judicial appraisal of the proofs [in a Federal Employers' Liability Act case] to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out, whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence."
>
> **Rogers v. Missouri Pacific**, 352 U. S. 500, 507, 1 L. Ed. 2d 493, 77 S. Ct. 443.

It is only "when there is a complete absence of probative facts to support the conclusion reached" that the jury's verdict, based upon the conclusion, may be set aside by the judge.

> **Lavender v. Kurn**, 325 U. S. 645, 653, 90 L. Ed. 916, 66 S. Ct. 740.

In the case at bar there was evidence (1) that a few days after the assignment of Anderson to the plaintiff's crew, prior to the assault, the defendant's roadmaster

plaintiff's superior—asserted that plaintiff would "have to watch" Anderson because Anderson was a "bad actor" and a "trouble maker," and (2) that the day after the assault by Anderson upon plaintiff the same roadmaster told plaintiff: "I told you to look out for him. Now you got yourself in plenty of trouble."

The jury was entitled to believe this evidence, and, believing it, to reach the conclusion that the defendant knew that Anderson was a potentially violent, and therefore dangerous, man. Indeed, if the evidence were believed, no other conclusion was rationally possible. The phrases "bad actor" and "trouble maker" are colloquial, but their meanings are well known. Used with reference to a section-crew laborer, and coupled with an admonition to "watch" the man so characterized, they clearly describe one from whom physical harm might be suffered, given appropriate circumstances and required provocation.

The Appellate Court opinion below relies heavily on testimony adduced by the defendant that Anderson had not been "known to strike or threaten to strike or quarrel with other employees or with a foreman" before his assault upon plaintiff, and upon testimony by Anderson himself, that he had never quarreled with his fellow laborers or superiors. But "where . . . there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." **Lavender v. Kurn**, 327 U. S. 645, 653, 90 L. Ed. 916, 66 S. Ct. 740.[1]

[1] The Appellate Court opinion in the case at bar also relies heavily on *Southern v. Roberts*, 206 F. 2d 508. But that was not a case under the Federal Employers' Liability Act, but under the Georgia statute, where different rules apply.

Moreover, a prior assault by the culprit is not necessary to the establishment of liability on the part of the railroad employer. It is the awareness on the part of the employer of conditions which make the assault reasonably foreseeable that creates the duty, and this awareness may be established circumstantially. **Lillie v. Thompson**, 332 U. S. 459, 68 S. Ct. 140, 92 L. Ed. 78. As stated by the Supreme Court of Illinois itself, to which the writ now sought would be directed,—

> ". . . [T]he clear and obvious holding of the **Lillie** case is that when an employer is aware, or should be aware, of conditions creating a likelihood of injury, he has a duty to make provisions against this foreseeable danger, even though the threatened hazard is from the intentional misconduct of third persons."
>
> **Tatham v. Wabash**, 412 Ill. 568, 107 N. E. 2d 735, 33 A. L. R. 2d 1287, 1294.

The final sentence in the sixth paragraph of the Appellate Court opinion in the case at bar,—

> "There was no positive evidence that the Roadmaster [Pratt] ever stated or admitted or knew that Anderson was a vicious or pugnacious person,"—

would, even if correct as a statement of fact, place a burden upon plaintiff which the law does not sanction. There is no requirement that facts be established by "positive" evidence. However, it would seem clearly that testimony that the roadmaster described Anderson as a "bad actor" and a "trouble maker," and warned his foreman to "look out for him" did constitute positive evidence that the roadmaster had stated and had admitted and had known that Anderson was vicious and pugnacious.

The penultimate sentence in the entire opinion as modified,—

> "It is apparent that Anderson may have been involved in stealing and when accused became angered and struck plaintiff to satisfy his own spite,"

is indubitably true; but it begs the question, which is whether the railroad was negligent in retaining Anderson in its employ and assigning him to plaintiff when it had reason to believe he might resort to physical violence to satiate his resentment against a superior for accusing him of misconduct, and whether that negligence played any part, no matter how small, in plaintiff's injury (**Rogers v. Missouri Pacific**, 352 U. S. 500, 507, 1 L. Ed. 2d 493, 77 S. Ct. 443).

General common law rules of liability, and state practices in respect of the sufficiency of evidence, do not govern cases under the Federal Employers' Liability Act, for the legislation is an avowed departure from the common law—a response to the special needs of railroad workers. **Tiller v. Atlantic Coast Line**, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 143 A. L. R. 967; **Sinkler v. Missouri Pacific**, 356 U. S. 326, 330, 2 L. Ed. 2d 799, 78 S. Ct. 758; **Lavender v. Kurn**, 327 U. S. 645, 651, 90 L. Ed. 916, 66 S. Ct. 740.[2]

[2] "Thus while the common law had generally regarded the torts of fellow servants as separate and distinct from the torts of the employer, holding the latter responsible only for his own torts, it was the conception of [the Federal Employers' Liability Act] that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor. Hence a railroad worker may recover from his employer for an injury caused in whole or in part by a fellow worker, not because the employer himself is to blame, but because justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all contributing their exertions with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be endangered. If this standard is not met and injury results, the worker is compensated in damages." *Sinkler v. Missouri Pacific*, 356 U. S. 326, 330, 2 L. Ed. 2d 799, 78 S. Ct. 758.

The statements attributed to the defendant's roadmaster in this case could rationally have been interpreted by the jury as showing an awareness that Anderson, the worker assigned to plaintiff's crew, was because of his disposition and temperament a potential danger to his fellow workers and superiors. Under the applicable law, the jury had the right to make that interpretation, and the court had no right to overpower it and thrust it aside.

CONCLUSION.

Wherefore, petitioner prays that this Court issue its writ of certiorari to the Supreme Court of Illinois.

Respectfully submitted,

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APPENDIX A.

In the
Appellate Court of Illinois,
Fourth District.
October Term, A. D. 1961.

John E. Harrison, Sr., Plaintiff-Appellant, vs. Missouri Pacific Railroad Company, a Corporation, Defendant-Appellee.	Appeal from the Circuit Court of St. Clair County.

[RECALLED OPINION.]

Culbertson, J.

This cause is before us on appeal from an order of the Circuit Court of St. Clair County granting defendant's motion notwithstanding the verdict and entering judgment in bar of the action of John E. Harrison, Sr., against Missouri Pacific Railroad Company. The complaint was filed under the provisions of the Federal Employers' Liability Act, to recover damages resulting from injuries inflicted upon the plaintiff by a co-employee named Anderson. The Jury in the cause had returned a verdict in the amount of $50,000.00 upon which judgment had been entered prior to the allowance of the post-trial motion for judgment notwithstanding the verdict. An alternative motion for a new trial was also filed by defendant and in the order granting the motion for judgment notwithstanding the verdict the Trial Court directed that in the event the judgment was reversed, the motion for new trial should be denied.

On appeal in this cause it is contended by plaintiff that he was discharging his duties as a section foreman and

protecting the railroad property, and that the defendant Company knew that the employee Anderson was a vicious, quarrelsome, and dangerous person. Defendant's contention is that the judgment notwithstanding the verdict was properly granted because plaintiff had failed to prove that Anderson, the employee who made the assault on the plaintiff, was in fact a vicious, quarrelsome, and pugnacious person prior to the time of the assault on the plaintiff.

The record before us discloses that plaintiff had been employed by the railroad company for more than 45 years, and had been a section foreman for more than 15 years. According to plaintiff, his immediate superior, the Roadmaster of defendant, who normally would give plaintiff directions (after the employee Anderson had been placed on the crew under the supervision of the plaintiff), talked to the plaintiff as foreman and stated, "you will have to watch him because he is a bad actor and a trouble maker," and, "I thought if you could get anything out of him nobody else could." The employee Anderson, who committed the assault upon the plaintiff, was 42 years of age at the time of the trial, and had worked as a section laborer since 1948. Several of the section foremen under whom the employee Anderson had worked before the assault on plaintiff in 1957, testified that they had never known Anderson to strike or threaten to strike, of quarrel with other employees, or with the foreman, and had never observed or received complaints that he was vicious, pugnacious, or quarrelsome, or would not do his share of the work. Anderson himself testified that he had never quarreled with other laborers with whom he worked, or with any of the foremen under whom he worked; that he had never threatened to fight any of them and had never been called in by any foreman by reason of any complaint made by co-employees. He also denied he had used vulgar language at public crossings, or had put pins in a motor car.

seat, as alleged, or that the plaintiff had ever accused him of doing so.

The plaintiff Harrison testified that he had seen Anderson take a ballast fork and hide it in some pulp wood adjacent to the track. He told him to go and get the ballast fork that he had stolen a few days previously and put it back on the pile of tools and nothing would be said about it. Employee Anderson took a few steps in the direction of where plaintiff stated he knew the fork was hidden and plaintiff turned his back and was looking in another direction when Anderson struck him an unexpected blow on the back of the head and knocked him unconscious. When the plaintiff regained consciousness and got on his feet he told Anderson, "That's all for you." Plaintiff then immediately attempted to get in touch with the Roadmaster, but being unable to talk to him he talked to a Special Agent for the railroad and asked him for directions. He was told to get the ballast fork and put it on the pile. He then went to the place where Anderson had hidden the fork, got it, and put it on the pile of tools. The following morning when he talked with the Roadmaster he stated that the Roadmaster said, "I told you to look out for him." The injuries sustained as a direct result of the assault have completely disabled plaintiff and prevented him from returning to work. The Roadmaster testified that from his personal observations of Anderson he had never seen any indication of a tendency to commit any such assault, and the Roadmaster also denied that plaintiff had complained to him about Anderson, and also that he had told plaintiff that Anderson was a bad actor and a trouble maker and that he would have to look out for him.

The cause was submitted to the jury and as indicated before, the jury returned a verdict in favor of the plaintiff. After the post-trial motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, was filed

by defendant, the Court allowed the motion for judgment notwithstanding the verdict and entered a judgment against plaintiff in bar of the action, with a supplementary order that if the judgment was reversed the motion for new trial would be denied. Under the common law the burden is on plaintiff to prove that an employee causing an injury to a fellow employee, was incompetent in some respect and that the incompetency was a causative factor in producing the injury, and that the master or employer knew of such incompetency or in the exercise of due care could have know of such incompetency. In willful assault cases where the assault which is committed is beyond the scope of the assailant's authority, the plaintiff has the same burden of proving that the employee was in fact, vicious and pugnacious prior to the assault in question and that the employer had knowledge of such propensities (**Tatham v. Wabash Railroad Co.**, 412 Ill. 568).

The basic question, therefore, is whether the evidence in the case tends to prove that Anderson was a vicious and pugnacious person and whether the employer knew or should have known of such propensities. The record fails to disclose that Anderson was ever known to be pugnacious, vicious, or quarrelsome, during the period of years prior to the assault, while he had worked as a railroad employee. The only evidence to which plaintiff points to sustain the case is the statement attributed to the Roadmaster that he was a bad actor and a trouble maker. There was no positive evidence that the Roadmaster ever stated or admitted or knew that Anderson was vicious or pugnacious person.

As indicated in the case of **Southern Railway Co. v. Roberts**, 206 F. 2d 508, the record in the case before us is devoid of any evidence of a propensity on part of the employee to violence or even fighting as those words are understood, or that Anderson was a dangerous person to have as an employee. In the case just referred to, the

individual was noted as a prankster and had engaged in a foul and offensive act on at least one occasion. There was no showing, however, that his activities included any course of making physical assaults on others. As indicated in that case, the right to recover had to be predicated not on a tendency to perpetrate pranks or other similar misconduct, but it must be shown he had a tendency to commit physical assaults on fellow employees. The Court in such case concluded that the evidence failed to show that the employee was, during the period of his employment, of such dangerous and violent character and disposition that his retention in employment by the defendant was negligence as a breach of the defendant railroad's obligation to its other employees to use reasonable care to provide them with safe conditions of employment.

We believe that the record in the instant case, likewise, fails to show that Anderson during the period prior to the assault, was such a dangerous person or of such character as to justify a recovery on the basis that the employer knew of such characteristics or in the exercise of reasonable care should have known of such dangerous characteristics. It is apparent that Anderson may have been involved in stealing and when accused became angered and struck plaintiff to satisfy his own spite. Under the circumstances and the record before us we conclude that the verdict is not sustained by a preponderance of the evidence, that it is clearly contrary to the manifest weight of the evidence and the order of the Circuit Court of St. Clair County in entering judgment notwithstanding the verdict was proper and is affirmed.

Judgment affirmed.

Hoffman, P. J., and Scheineman, J., concur.

Publish in full.

Filed Mar. 21, 1962. James R. McLaughlin, Clerk of the Appellate Court, Fourth District of Illinois.

APPENDIX B.

In the
Appellate Court of Illinois.
Fourth District.

October Term, A. D. 1961.

John E. Harrison, Sr.,
Plaintiff-Appellant,
vs.
Missouri Pacific Railroad Company, a Corporation,
Defendant-Appellee.

Appeal from the Circuit Court of St. Clair County.

[FINAL MODIFIED OPINION.]

Culbertson, J.

This cause is before us on appeal from an order of the Circuit Court of St. Clair County granting defendant's motion notwithstanding the verdict, and entering judgment in bar of the action of John E. Harrison, Sr., as against Missouri Pacific Railroad Company. The complaint was filed under the provisions of the Federal Employers' Liability Act, to recover damages resulting from injuries inflicted upon the plaintiff by a co-employee named Anderson. The Jury in the cause had returned a verdict in the amount of $50,000.00 upon which judgment had been entered prior to the allowance of the post-trial motion for judgment notwithstanding the verdict. An alternative motion for a new trial was also filed by defendant and, in the order granting the motion for judgment notwithstanding the verdict the trial court directed that in the event the judgment was reversed, the motion for new trial should be denied.

On appeal in this cause it is contended by plaintiff that he was discharging his duties as a section foreman and

protecting the railroad property, and that the defendant Company knew that the employee Anderson was a vicious, quarrelsome, and dangerous person." Defendant's contention is that the judgment notwithstanding the verdict was properly granted because plaintiff had failed to prove that Anderson, the employee who made the assault on the plaintiff, was in fact a vicious, quarrelsome, and pugnacious person prior to the time of the assault on the plaintiff.

The record before us discloses that plaintiff had been employed by the railroad company for more than 45 years, and had been a section foreman for more than 15 years. According to plaintiff, his immediate superior, the Road master of defendant, who normally would give plaintiff directions (after the employee Anderson had been placed on the crew under the supervision of the plaintiff), talked to the plaintiff as foreman and stated, "you will have to watch him because he is a bad actor and a trouble maker", and, "I thought if you could get anything out of him nobody else could." The employee Anderson, who committed the assault upon the plaintiff, was 42 years of age at the time of the trial, and had worked as a section laborer since 1948. Several of the section foremen under whom the employee Anderson had worked before the assault on plaintiff in 1957, testified that they had never known Anderson to strike or threaten to strike, or quarrel with other employees, or with the foreman, and had never observed or received complaints that he was vicious, pugnacious, or quarrelsome, or would not do his share of the work. Anderson himself, testified that he had never quarreled with other laborers with whom he worked, or with any of the foremen under whom he worked; that he had never threatened to fight any of them and had never been called in by any foreman by reason of any complaint made by co-employees. He also denied he had used vulgar language at public crossings, or had put pins in a

motor car seat, as alleged, or that the plaintiff had ever accused him of doing so.

The plaintiff Harrison testified that he had seen Anderson take a ballast fork and hide it in some pulp wood adjacent to the track. He told him to go and get the ballast fork that he had stolen a few days previously and put it back on the pile of tools and nothing would be said about it. Employee Anderson took a few steps in the direction of where plaintiff stated he knew the fork was hidden and plaintiff turned his back and was looking in another direction when Anderson struck him an unexpected blow on the back of the head and knocked him unconscious. When the plaintiff regained consciousness and got on his feet he told Anderson, "That's all for you." Plaintiff then immediately attempted to get in touch with the Roadmaster, but being unable to talk to him he talked to a Special Agent for the railroad and asked him for directions. He was told to get the ballast fork and put it on the pile. He then went to the place where Anderson had hidden the fork, got it, and put it on the pile of tools. The following morning when he talked with the Roadmaster he stated that the Roadmaster said, **"I told you to look out for him."** The injuries sustained as a direct result of the assault have completely disabled plaintiff and prevented him from returning to work. The Roadmaster testified that from his personal observations of Anderson he had never seen any indication of a tendency to commit any such assault, and the Roadmaster also denied that plaintiff had complained to him about Anderson, and also that he had told plaintiff that **Anderson was a bad actor and a trouble maker and that he would have to look out for him.**

The cause was submitted to the jury and as indicated before, the jury returned a verdict in favor of the plaintiff. After the post-trial motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, was filed

to defendant, the Court allowed the motion for judgment notwithstanding the verdict and entered a judgment against plaintiff in bar of the action, with a supplementary order that if the judgment was reversed the motion for new trial would be denied. Under the common law the burden is on plaintiff to prove that an employee causing an injury to a fellow employee, was incompetent in some respect and that the incompetency was a causative factor in producing the injury, and that the master or employer knew of such incompetency or in the exercise of due care could have known of such incompetency. In wilful assault cases where the assault which is committed is beyond the scope of the assailant's authority, the plaintiff has the same burden of proving that the employee was in fact, vicious and pugnacious prior to the assault in question and that the employer had knowledge of such propensities (**Tatham v. Wabash Railroad Co.**, 412 Ill. 568).

The basic question, therefore, is whether the evidence in the case tends to prove that Anderson was a vicious and pugnacious person and whether the employer knew or should have known of such propensities. The record fails to disclose that Anderson was ever known to be pugnacious, vicious or quarrelsome, during the period of years prior to the assault, while he had worked as a railroad employee. The only evidence to which plaintiff points to sustain the case is the statement attributed to the Roadmaster that he was a bad actor and a trouble maker. There was no positive evidence that the Roadmaster ever stated or admitted or knew that Anderson was vicious or pugnacious person.

As indicated in the case of **Southern Railways Co. v. Roberts**, 206 F. 2d 508, the record in the case before us is devoid of any evidence of a propensity on part of the employee to violence or even fighting as those words are understood, or that Anderson was a dangerous person to have as an employee. In the case just referred to, the

individual was noted as a prankster and had engaged in a foul and offensive act on at least one occasion. There was no showing, however, that his activities included any course of making physical assaults on others. As indicated in that case, the right to recover had to be predicated not on a tendency to perpetrate pranks or other similar misconduct, but it must be shown he had a tendency to commit physical assaults on fellow employees. The Court in such case concluded that the evidence failed to show that the employee was, during the period of his employment, of such dangerous and violent character and disposition that his retention in employment by the defendant was negligence as a breach of the defendant railroad's obligation to its other employees to use reasonable care to provide them with safe conditions of employment.

We believe that the record in the instant case, likewise, fails to show that Anderson during the period prior to the assault, was such a dangerous person or of such character as to justify a recovery on the basis that the employer knew of such characteristics or in the exercise of reasonable care should have known of such dangerous characteristics. **It is apparent that Anderson may have been involved in stealing and when accused became angered and struck plaintiff to satisfy his own spite.** Under the circumstances and the record before us it appears the order of the Circuit Court of St. Clair County in entering judgment notwithstanding the verdict was proper and should be affirmed.

Judgment affirmed.

Hoffman, P. J., and Scheineman, J., concur.

Publish in full.

Filed Apr. 19, 1962. James R. McLaughlin, Clerk of the Appellate Court, Fourth District of Illinois.

APPENDIX C

In the
Supreme Court of Illinois

September Term, A. D. 1962

John E. Harrison, Sr., Plaintiff-Appellant Below, Petitioner Here, vs. Missouri Pacific Railroad Company, a Corporation, Defendant-Appellee Below, Respondent Here.	Petition for Leave to Appeal From Appellat Court, Fourth District. There Heard on Appeal From the Circuit Court of St. Clair County, Illinois.

September 26, 1962.

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by it in this behalf expended, to be taxed, and that it have execution therefor.

SUPREME COURT, U. S.
JAN 23 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 690.

JOHN E. HARRISON, SR.,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
a Corporation,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois.

BRIEF FOR RESPONDENT IN OPPOSITION.

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INDEX.

	Page
Opinions below	1
Questions presented for review	2
Statement of the case	2
Argument	4
1. Insufficiency of record	4
2. Opposing issuance of writ	5
Conclusion	8
Appendix A	9

Cases Cited.

Atlantic Coast Line Railroad Co. v. Southwell, 275 U. S. 64, 72 L. ed. 157, 48 S. Ct. 25	6
Dincher v. Great Atlantic & Pacific Tea Co. (Pa.), 51 Atl. 2d 710, 715	7
Finley v. New York Central Railroad Co., 19 Ill. 2d 428, 433, 167 N. E. 2d 212	5
Inman v. Baltimore & Ohio Railroad Co., 361 U. S. 138, 4 L. ed. 2d 198, 80 S. Ct. 242	7
Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. Rock, 279 U. S. 410, 73 L. ed. 766, 49 S. Ct. 363	4, 5
Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500, 1 L. ed. 2d 493, 77 S. Ct. 443	5
Southern Railway Co. v. Roberts, 1953, 5 cir., 206 F. 2d 508, 512	7
Tatham v. Wabash Railroad Company, 412 Ill. 568, 107 N. E. 2d 735	7

Statutes Cited.

Illinois Revised Statutes, 1961, Chapt. 110, Para. 75	4
Title 28, U. S. C., § 1257 (3)	4

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OPINIONS BELOW.

The only opinion of the Appellate Court of Illinois is the one entered on April 19, 1962, reported in 35 Ill. App. 2d 66, 181 N. E. 2d 737, set forth in Appendix B of the petition. The Appellate Court opinion set forth in Appendix A was filed, but recalled by that Court by order thereafter entered (App. 89 (39)).

QUESTIONS PRESENTED FOR REVIEW.

There are two questions presented for review:

(1) Was Anderson, the assailant, a pugnacious, vicious, and quarrelsome man prior to the assault on petitioner?

(2) Did respondent know or should it have known of such propensities prior to such assault?

STATEMENT OF THE CASE.

Petitioner Harrison, a section foreman and the immediate superior of Anderson, a section hand in his crew, accused Anderson of stealing a ballast fork, the property of respondent (App. 26). Petitioner testified that he then turned away and was immediately struck by Anderson (App. 26). Other employees then present testified that Anderson denied the accusation (App. 54, 59, 63), and told Harrison he would strike him if the accusation was repeated (App. 54, 63). The accusation was repeated whereupon Anderson struck Harrison one blow on the back of the neck (App. 54, 59, 63).

Petitioner offered no evidence that Anderson, prior to the assault, was pugnacious, vicious or contentious, or that he did any act evincing such propensities, or that he had the reputation of being pugnacious and vicious. Petitioner in fact testified he had never seen Anderson strike anyone (App. 39). The evidence of respondent was overwhelming that Anderson did not have such propensities corroborated by all of the other foremen living at the time of trial, under whom Anderson worked (App. 66, 67, 69), and several of his co-workers (App. 57, 62, 70, 71, 73, 74).

Petitioner did testify to the statements of Praft, the roadmaster, as quoted on page 3 of the petition, which

statements were denied by Pratt (App. 48, 50). In addition, petitioner testified that Anderson had stuck pins in petitioner's seat on the motor car on one occasion, made vulgar remarks while passing over public crossings, refused to push the motor car to get it started (App. 24), and would not do his share of the work (App. 34). Anderson denied the foregoing events (App. 55), and the two other crew members either denied that such events occurred or had no knowledge of their occurrence (App. 57, 59, 62).

Petitioner testified he reported these events to Pratt who did nothing (App. 24). Pratt denied that any such events were reported to him (App. 50).

ARGUMENT

I. Insufficiency of Record.

Whether the writ of certiorari sought should be directed to the Supreme Court of Illinois as petitioner prays, or to the Appellate Court of Illinois as respondent believes, the record filed in this court is insufficient. Petitioner has not filed with the Appendix, as required by Supreme Court Rule 21 (3) "all the proceedings in the court below, the whole to be duly certified." Only an abstract of the Appellate Court proceedings has been filed beginning on page 87 of the Appendix. The only proceedings in the Supreme Court filed are the Appendix and the petition filed for leave to appeal.

The record filed here does not contain the judgment of the Appellate Court, but only an abstract of the entry thereof (App. 84 (48)). Nor does the record here contain the judgment of the Supreme Court of Illinois, although it is copied as Appendix C in the petition.

Under Illinois law, the judgment of the Appellate Court of Illinois became final when the Supreme Court of Illinois denied leave to appeal. Illinois Revised Statutes, 1961, Chapt. 110, Para. 75 (Appendix A).

The final judgment, therefore, sought to be reviewed here is the decision of the Appellate Court, although the petition for leave to appeal and the denial thereof by the Supreme Court of Illinois were necessary to confer jurisdiction on this Court under Title 28, U. S. C., § 1257 (3). Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. Rock, 279 U. S. 410, 73 L. ed. 766, 49 S. Ct. 363.

2. Opposing Issuance of Writ.

The petition here seeks review of questions decided adversely to petitioner by the Trial Court, the Appellate Court of Illinois, and the Supreme Court of Illinois when, in its discretion, it denied leave to appeal. While the Supreme Court's refusal to review the case is not as authoritative as if it had reviewed and affirmed the Appellate Court, its judgment is an approval of the result. As this Court said in Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. Rock, 279 U. S. 410, 73 L. ed. 766, 49 S. Ct. 363, in a case decided by Illinois courts:

> "While such denial is not an approval of the reasons on which the Appellate Court rested its judgment, it is an approval of the conclusion reached by it and is therefore, in effect, an affirmance of the judgment."

The Supreme Court of Illinois has been as zealous as any State Court in protecting the rights of employees under the Federal Employers' Liability Act; and it has been careful to heed the admonitions of this Court as to the relative functions of the Court and jury in such cases. In the recent case of Finley v. New York Central Railroad Co., 19 Ill. 2d 428, 433, 167 N. E. 2d 212, the Court quotes from Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500, 1 L. ed. 2d 493, 77 S. Ct. 443, as does petitioner on page 8 of his petition as to the nature of the judicial appraisal of proofs permissible by the Court in such cases.

Petitioner uses the first opinion of the Appellate Court of Illinois (App. A) as the basis of his argument that the Court decided the case only on the weight of the evidence. The language contained therein, which was deleted in the published opinion quoted on page 7 of the petition, was evidently a mental lapse of the scrivener of the opinion. It was not only wrong as to its function in the review of the

sufficiency of evidence in Federal Employers' Liability Act cases, but assuming it had the power to weigh the evidence, it was also contrary to state practice, since the only proper judgment on deciding the verdict was against the manifest weight of the evidence was to reverse and remand for a new trial.

When the Appellate Court became aware of its error, it recalled the opinion, as it had a right to do, and it then had a free chance to express its true intent, either to hold that there was some evidence to sustain the verdict and reverse, or hold there was no evidence to sustain the verdict and affirm. It chose the latter course, not by a final modified opinion as petitioner suggests, but as the one and only opinion of the Court.

We submit, therefore, that it can be said with confidence in this case the Illinois courts have made such appraisal of the evidence as this Court requires and found petitioner's evidence did not, with reason, warrant the conclusion that respondent's negligence played any part in petitioner's injury.

The ultimate determination of this case is of interest only to the litigants. No public interest is involved; there are no important legal principles involved.

This case appears to have been decided in accordance with prior decisions of this Court, and not in conflict with any prior decisions. In Atlantic Coast Line Railroad Co. v. Southwell, 275 U. S. 64, 72 L. ed. 157, 48 S. Ct. 25, this Court considered a case where one railroad employee having killed another employee, suit was brought by the decedent's administrator against the railroad for the death, charging the railroad permitted or failed to prevent the murder, contending threats had been made by the assailant against decedent on previous occasions and the railroad knew or should have known thereof and should have taken

action to prevent it. The Court, speaking through Mr. Justice Holmes, said:

> "The only sinister designs of which there is any evidence were of Southwell (the decedent) against Dallas (the assailant), unless Dallas' remark just before the shooting be taken to foreshadow the event which it certainly did not seem to until after the event had happened. It appears to us to be extravagant to hold petitioner liable in a case like this."

This case was tried on the theory sustained by the Supreme Court of Illinois in the case of Tatham v. Wabash Railroad Company, 412 Ill. 568, 107 N. E. 2d 735, where the Court held that a complaint alleging that Davis was pugnacious and vicious, that the railroad employed him with knowledge of those propensities, and that plaintiff was injured by a wilful assault by Davis stated a cause of action.

This Tatham case as well as Southern Railway Co. v. Roberts, 1953, 5 Cir., 206 F. 2d 508, 512, and Dincher v. Great Atlantic & Pacific Tea Co. (Pa.), 51 Atl. 2d 710, 745, hold that proof that the assailant was in fact pugnacious and vicious is a necessary element of the cause of action. Petitioner has offered no evidence on this issue.

Petitioner being unable to adduce evidence that Anderson was pugnacious is forced to base his action on the statements he attributes to Pratt, the roadmaster, quoted on page 3 of the petition to prove the fact of pugnacity and the railroad's knowledge thereof. Such a statement is too tenuous upon which to base liability. Inman v. Baltimore & Ohio Railroad Co., 361 U. S. 138, 4 L. ed. 2d 198, 80 S. Ct. 242. These statements are not meaningful, absent some evidence as to Anderson's traits to give them character and meaning. They do not tend to prove that respondent's roadmaster knew that Ander-

son was pugnacious, and they do not tend to prove that he was in fact pugnacious. The only evidence in the case tending to give meaning to the roadmaster's words is that of petitioner that Anderson was a practical joker, disobedient, used vulgar language at crossings and would not do his share of the work. These characteristics describe a bad actor and a trouble maker but do not suggest that other employees are endangered by any reasonable probability of violence by such a person.

We respectfully submit that under the evidence in this case, it cannot be said with reason that the conclusion may be drawn that negligence of respondent played any part in the injury.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari be denied.

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APPENDIX A.

§ 75. (Civil Practice Act, § 75). Jurisdiction of Appellate and Supreme Courts.

(1) Appeals shall be taken directly to the Supreme Court (a) in all cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved, (b) in all cases relating to revenue, or in which the State is interested as a party or otherwise and (c) in cases in which the validity of a municipal ordinance or county zoning ordinance or resolution is involved and in which the trial judge certifies that in his opinion the public interest so requires.

(2) In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject however, to the following exceptions: (a) in case a majority of the judges of the Appellate Court or of any branch thereof shall be of the opinion that a case decided by them involves a question of such importance, either on account of principal or collateral interest, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (b) In any such case as is hereinbefore made final in the Appellate Court, it is competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the Supreme Court. (c) In any case heard and determined in the trial court upon actual trial in which the Appellate Court upon appeal from the final

judgment or decree entered in the cause in the trial court reverses the judgment or decree and remands the cause for a new trial or hearing, and in which the party in whose favor the trial court's judgment or decree was rendered presents to and files with the Appellate Court an affidavit stating that he will be unable on a future trial or hearing to adduce other or additional evidence, facts or circumstances than were adduced in the trial court and expressly waiving the right to a new trial or hearing and consenting and requesting that the portion of the judgment of the Appellate Court remanding the cause for new trial or hearing be deleted and stricken from the judgment of the Appellate Court, then that court upon motion shall amend its judgment by striking out the portion thereof remanding the cause for new trial or hearing." Thereupon it is competent for the Supreme Court to grant leave to appeal from such final judgment of reversal for its review and determination with the same power and authority in the case and with like effect, as in other cases in which leave to appeal from the final judgments of the Appellate Courts is authorized in this section.

Provided, however, the application under this Act to the Supreme Court to cause it to grant leave to appeal for its review and determination shall be made within 40 days after the judgment of the Appellate Court has become final, either through the denial of a petition for rehearing or the expiration of the time within which a petition for rehearing might be filed; otherwise the power of the Supreme Court to review the judgment and decree of the Appellate Court shall cease to exist. Answers to such petitions for leave to appeal may be filed by respondent within 15 days after the expiration of the time for the filing of the petition for leave to appeal or within such further time as the Supreme Court or some Justice thereof in vacation may grant, if granting within such 15-day period. As amended 1959, July 21, Laws 1959, p. 1784.